TEO CHEE KONG v. PP

COURT OF APPEAL, PUTRAJAYA
MOHAMAD ZABIDIN MOHD DIAH JCA
RAVINTHRAN PARAMAGURU JCA
LEE HENG CHEONG JCA
[CRIMINAL APPEAL NO: S-06A-14-04-2018]
3 JUNE 2021

CIVIL PROCEDURE: *Judge – Recusal – Application for – Judge read submissions and affidavits in previous forfeiture application involving accused – Accused subsequently charged under s. 4(1)(a) and (b) of Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 – Whether judge would form prejudicial opinion against accused – Whether there was 'real danger of bias'*

CIVIL PROCEDURE: *Trial – Joint trial – Whether there was common link between accused persons – Whether there was unity of purpose or design to commit crime – Whether involved common witnesses – Whether order for joint trial would expedite trial for benefit of all*

The appellant was arrested for the purpose of a major corruption investigation involving the Sabah Water Department of which he was the Deputy Director. The Director, Awang Mohd Tahir Mohd Talib ('Awang'), his wife, Fauziah Ag Piut ('Fauziah') and the former Deputy Director, Lim Lam Beng ('Lim') were also arrested at around the same time. Awang, Fauziah and Lim were charged with several charges under the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('AMLATFPUAA') with respect to monies and properties worth tens of millions of ringgit. The appellant was not charged together with the other arrested persons. Instead, the prosecution instituted forfeiture proceedings in the High Court against properties and monies held by him and his son under the AMLATFPUAA. The prosecution also instituted forfeiture proceedings under s. 41 of the Malaysian Anti-Corruption Commission Act 2009 ('MACC Act') in respect of cash monies seized from him. However, 14 months after his arrest, the appellant was charged before the Sessions Court where a total of 146 charges under s. 4(1)(a) and s. 4(1)(b) of the AMLATFPUAA were preferred against the appellant. The total sum of the monies which were the subject matter of the 146 charges was over RM32 million. The appellant claimed trial to all the charges. During a case management hearing, the prosecution applied for the charges against the appellant to be jointly tried with the charges against Awang, Fauziah and Lim. The defence objected to the said application. In the interim, the appellant wrote a letter to the Sessions Court Judge ('SCJ') and requested that he recuse himself from the case. The reason advanced was that the prosecution had filed an application under s. 41(1) of the MACC Act to

forfeit cash monies in the sum of RM5,952,050 and about RM1,891,029.44 in foreign currency that were seized from the appellant. The appellant submitted that six of the 146 charges against the appellant were in respect of the said cash monies. His main reason for the application to recuse the SCJ was that there was reasonable suspicion of bias that the SCJ may have already formed an opinion although no decision had been delivered yet. The SCJ dismissed the forfeiture application and dismissed the recusal application. In respect of the application of the prosecution for joint trial of the appellant's case with the money laundering case against Awang, Fauziah and Lim, the SCJ allowed the application. The appellant applied to the High Court for revision of the decision of the SCJ not to recuse himself and to grant the application of the prosecution for joint trial. The High Court Judge ('HCJ') dismissed the revision application wholly. Hence, this appeal.

Held (dismissing appeal)
Per Ravinthran Paramaguru JCA delivering the judgment of the court:

(1) It may well be that the cash monies which were the subject matter of six of the AMLATFPUAA charges were the same monies in the forfeiture application. However, the forfeiture application was not heard by way of trial. Therefore, although affidavits and submissions were filed in the forfeiture application, the SCJ did not make any finding on the credibility of the appellant beyond having access to the competing affidavits of the appellant and the prosecution. The SCJ did not decide on the forfeiture on its merits. He dismissed the application on the sole ground that cash monies would be tendered as exhibits in the pending money laundering criminal case under the AMLATFPUAA. In the premises, the argument that the SCJ had formed an 'opinion' and was 'prejudiced' against the appellant had no factual basis as the application was not decided on the merits. There was no 'real danger of bias' if the same judge heard the AMLATFPUAA case. There was no appealable error in the decision of the HCJ to dismiss the revision application in respect of the recusal issue. (paras 20-22)

(2) In money laundering or corruption cases that involves several persons and an elaborate scheme, it is entirely probable that the place of crime or the time applicable to a particular accused may differ from that of a co-accused. However, the common link between accused persons would be 'unity of purpose or design' to commit the crime in question. All the money laundering charges in question were allegedly in relation to corrupt practices committed by accused persons who held senior positions in the Sabah Water Department. Thus, the case of the appellant and that of the other three accused persons involved common witnesses. As common witnesses would be called to testify against all accused persons including the appellant and the element of same transaction had been demonstrated, there was no reason to conclude that

the SCJ had exercised his discretion wrongfully. The HCJ had no material to revise the said decision under s. 323 of the Criminal Procedure Code. In fact, the trial would be expedited for the benefit of all because of the order for joint trial. (paras 29 & 33)

Case(s) referred to:
Amrita Lal Hazra v. Emperor 42 Cal 957 ***(refd)***
Babulal Choukhani v. Emperor AIR 1938 PC 130 ***(refd)***
Chin Choy v. PP [1955] 1 LNS 17 CA ***(refd)***
Daniel Yong Chen-1 v. PP [2020] 3 CLJ 86 HC ***(refd)***
Jayaraman & Ors v. PP [1979] 1 LNS 36 HC ***(refd)***
Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65 FC ***(refd)***
Menteri Hal Ehwal Dalam Negeri v. Raja Petra Raja Kamarudin & Another Appeal [2009] 3 CLJ 513 FC ***(refd)***
PP v. Lau Tuck Weng & Anor [1988] 1 LNS 79 HC ***(dist)***
PP v. Loh Ang Sing [1964] 1 LNS 145 HC ***(refd)***
PP v. Mohd Amin Mohd Razali & Ors [2002] 5 CLJ 281 HC ***(refd)***
PP v. Tengku Adnan Tengku Mansor [2020] 9 CLJ 30 FC ***(refd)***
R v. Gough [1993] AC 646 ***(refd)***
Syed Ismail v. PP [1967] 1 LNS 175 HC ***(refd)***
Wong Kie Chie v. Kathryn Ma Wai Fong & Anor And Other Appeals [2017] 5 CLJ 707 CA ***(refd)***
Yap See Teck v. PP [1983] 1 CLJ 97; [1983] CLJ (Rep) 953 HC ***(refd)***

Legislation referred to:
Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001, s. 4(1)(a), (b)
Criminal Procedure Code, ss. 170(1), 323
Evidence Act 1950, s. 122
Malaysian Anti-Corruption Commission Act 2009, ss. 16(a)(A), (b)(A), 41(1)
Penal Code, s. 109
Securities Industry (Central Depositories) Act 1991, s. 29A

For the appellant - Roland Cheng, Ram Singh, Kimberly Ye Wan Chuin & Michele Yee; M/s Roland Cheng & Co
For the respondent - Allan Suman Pillai & Mohd Sophian Zakaria; DPPs

[Editor's note: Appeal from High Court, Kota Kinabalu; Criminal Revision No. BKI-43-6-2-2018 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Ravinthran Paramaguru JCA:

Introduction

[1] This appeal originates from a criminal revision application (BKI-43-6-2-2018) that was heard before the High Court sitting in Kota Kinabalu under s. 323 of the Criminal Procedure Code. At the Sessions Court, the appellant had applied to recuse the learned Sessions Court Judge. The

A application was dismissed by the Sessions Court. The appellant also applied in the same revision application to overturn the decision of the Sessions Court to order joint trial of the appellant's case with that of three other accused persons. The learned High Court Judge wholly dismissed the revision application and hence this appeal.

B **Background Facts**

[2] On 4 October 2016, the appellant was arrested for the purpose of a major corruption investigation involving the Sabah Water Department of which he was the Deputy Director. The Director (Awang Mohd Tahir Mohd Talib) of the Sabah Water Department, his wife (Fauziah Ag Piut) and the C former Deputy Director, Lim Lam Beng were also arrested at around the same time. Awang Mohd Tahir Mohd Talib, Fauziah Ag Piut and Lim Lam Beng were charged with several charges under the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ("AMLATFPUAA") on 29 December 2016 with respect to monies and D properties worth tens of millions of ringgit. The appellant was not charged together with the other arrested persons. Instead, the prosecution instituted forfeiture proceedings in the High Court against properties and monies held by him and his son under AMLATFPUAA. The prosecution also instituted forfeiture proceedings under s. 41 of the Malaysian Anti-Corruption E Commission Act 2009 ("the MACC Act") in respect of cash monies seized from him.

[3] However, some 14 months after his arrest, on 12 December 2017, the appellant was charged before the Sessions Court in Criminal Case Nos. BFT-61R-1-12-2017 to BFT-61R-21-12-2017 and BKI-61R-31-12-2017 to BKI-F 61R-60-12-2017. A total of 146 charges under s. 4(1)(a) and s. 4(1)(b) of the AMLATFPUAA were preferred against the appellant. The total sum of the monies which are the subject matter of the 146 charges is over RM32 million. The appellant claimed trial to all the charges. On 16 January 2018, during a case management hearing, the prosecution applied for the charges G against the appellant to be jointly tried with the charges against Awang Mohd Tahir Mohd Talib, Fauziah Ag Piut and Lim Lam Beng in Criminal Cases Nos. BKI-61R-10-12-2016 to BKI-61R-24-12-2016. The defence objected to the said application. The learned Sessions Court Judge adjourned the matter for decision to 30 January 2018.

H **[4]** In the interim, on 26 January 2018, counsel for the appellant wrote a letter to the learned Sessions Court Judge and requested that he recuse himself from the case. The reason advanced in the letter is that on 13 July 2017, the prosecution had filed an application under s. 41(1) of the MACC Act to forfeit cash monies in the sum of RM5,952,050 and about I RM1,891,029.44 in foreign currency that were seized from the appellant. Section 41(1) empowers the court to forfeit seized property where there is

no prosecution if the said property had been obtained as a result of or in connection with an offence under the MACC Act. Counsel for the appellant submitted in the said letter that six of the 146 charges against the appellant are in respect of the said cash monies. His main reason for the application to recuse the Sessions Court Judge is stated in the following paragraph of the said letter:

> By reason of the above matters, there is reasonable suspicion of bias that Your Honour may have already formed an opinion although no decision has been delivered yet and be embarrassed and/or prejudiced by virtue of having read the documents and submissions filed in the said FOP Cash.

[5] On 30 January 2018, the learned Sessions Court Judge dismissed the forfeiture application under the MACC Act first before proceeding to consider the recusal application in the AMLATFPUAA case. Although, the submissions had been filed for the forfeiture application under the MACC Act, the prosecution indicated that they were still waiting for instructions in order to decide whether to continue with the application. The learned Sessions Court Judge however decided to dismiss the application. His sole reason as stated in the notes of proceedings reads as follows:

> The reason being is that the seized property as mentioned in encl. 1 is now subjected to ongoing trial BFT-61R-1/12-2017 as part of the prosecution exhibits and cannot be forfeited or disposed until full disposal of the trial.

[6] The learned Sessions Court Judge then proceeded to deliver his ruling in the AMLATFPUAA case in respect of the application to recuse him. He dismissed the application. The crux of his decision is stated in the following paragraph of the notes of proceedings:

> Having considered the application and the reason stated by the defence counsel in his letter that I have read the said application and the respective submissions from both the prosecution and the accused in the said FOP and there is reasonable suspicion of bias that I may have already formed and opinion although no decision has been delivered yet by me, I am of the view that all these allegations are without basis and premature and subject to strict proof by the defence counsel. In addition the FOP application which is supported by way of affidavit evidence and the on going trial by way of oral evidence of all the prosecution witnesses is a separate proceeding altogether. There are no issue of conflict of interest, reasonable biasness or prejudice to the accused either directly or indirectly.

[7] In respect of the application of the prosecution for joint trial of the appellant's case with the money laundering case against Awang Mohd Tahir Mohd Talib, Fauziah Ag Piut and Lim Lam Beng, the learned Sessions Court Judge allowed the application. His reasons as stated in the notes of proceedings are as follows:

1. The charges faced by all the accused are common in nature, the series of act so connected together as to form the same transactions within the meaning of community of purpose and design;

2. Even the four test laid down in *Amrita Lal*'s case, it is trite law that it is not necessary that all of them should be present to make the several incidents parts of the same transaction. The main test is that of unity of purpose or design. As to what is the same transaction must depend upon the facts and circumstances in each particular case;

3. It is also not obligatory or mandatory for the Court to find that all the four test laid down in *Amrita Lal*'s case should be satisfied before a joint trial order be issued;

4. Based on provision of s. 170 CPC, this application is a matter of discretion for the judge of the trial. The discretion no doubt must be exercise judicially, that is not capriciously. More importantly the accused person will not be prejudice should the Court makes an order for joint trial;

5. Finally, the trial could be expedited as the prosecution would be calling the said witnesses during trial. From the list of witnesses, it's clearly shown that the same witnesses will be called during the trial involving charges against all the accused.

[8] The appellant applied to the High Court for revision of the decision of the Sessions Court Judge not to recuse himself and to grant the application of the prosecution for joint trial.

Decision Of High Court

[9] The learned High Court Judge dismissed the revision application wholly. In respect of the recusal application that was dismissed by the Sessions Court, the learned High Court Judge said that there was no real danger of bias. In respect of the joint trial that was ordered by the Sessions Court, the learned High Court Judge said that decision would expedite the trial and benefit all parties as common witnesses are involved in all the related cases.

Argument Of Parties

[10] In respect of the recusal application, the argument of appellant is as follows. Counsel for the appellant submitted that the Sessions Court Judge would have read the submission and affidavits in the forfeiture application under s. 41 of the MACC Act. Therefore, the Sessions Court Judge would be "prejudiced" and would have formed an opinion "against" the appellant. Counsel for the appellant pointed out that six of the 146 charges in the instant AMLATFPUAA cases are in respect of the same properties that the prosecution wanted to forfeit under s. 41 of the MACC Act. Citing the Federal Court case of *Menteri Hal Ehwal Dalam Negeri v. Raja Petra Raja*

Kamarudin & Another Appeal [2009] 3 CLJ 513; [2009] 4 MLJ 484 and the Court of Appeal case of *Wong Kie Chie v. Kathryn Ma Wai Fong & Anor And Other Appeals* [2017] 5 CLJ 707; [2017] 3 MLJ 350, counsel for accused persons submitted that there is a real likelihood of bias on the part of the Sessions Court Judge against his client. He also cited the case of *PP v. Lau Tuck Weng & Anor* [1988] 1 LNS 79; [1988] 3 MLJ 217 where KC Vohrah J disqualified himself because a potential witness in the case was an accused in another case that he had tried earlier.

[11] The contention of the learned Deputy Public Prosecutor ("DPP") was as follows. The test in Malaysia for recusal of a judge is that enunciated in *R v. Gough* [1993] AC 646, ie, "the real danger of bias" test and in this case, the appellant had failed to satisfy the said test. He said that in the instant case, there was no real possibility of bias merely because the Sessions Court Judge had read the forfeiture application, the affidavits and the submissions in question.

Our Decision On The Recusal Application

[12] In our opinion, there is no merit in the appeal against the decision of the learned High Court Judge who refused to exercise her revisionary power to recuse the learned Sessions Court Judge from hearing the instant case. Our reasons are as follows.

[13] Firstly, we shall refer to the test that must be satisfied to recuse a judge from hearing a case. The parties agreed that the test in Malaysia is the "real danger of bias" test propounded in the English House of Lords case of *R v. Gough* [1993] AC 646. Prior to this decision, there was divergence of opinion between judges who preferred "the reasonable suspicion" of bias test and those who preferred the "real likelihood of bias test" (see the judgment of Edgar Joseph Jr FCJ in the Federal Court case of *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65). Our superior courts have consistently adopted the "real danger of bias" test since the above-mentioned decision of the Federal Court. In the following passage from *R v. Gough* (*supra*) which was cited by Edgar Joseph Jr FCJ, Lord Goff explained the test as follows:

> Having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard "(or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him".

[14] Edgar Joseph Jr FCJ in preferring the test formulated by Lord Goff, said as follows:

> The "*real danger*" test favoured in *Gough* could be seen as a compromise between "*the reasonable suspicion*" of bias test and the "*real likelihood"* of bias test so as to stress that the Court is contemplating a lower standard than

A "*likelihood*" or "*probability of bias*", that is to say, a "*real possibility of bias*." See, *Gough* at pp. 668 C-D, 670 E-F, per Lord Goff; p. 671 B-C, per Lord Woolf.

It is also important to note that the question of bias has to be answered by considering all the facts not merely by reference to the view of the
B hypothetical reasonable man (*R v. Gough*, per Lord Goff, at p. 670 D to E).

Having given careful consideration to the matter we prefer the test of apparent bias given in Gough ("the real danger of bias" test) as this will avoid setting aside of judgments upon "quite insubstantial grounds and the flimsiest pretexts of bias".

C (emphasis added)

[15] In the more recent case of *PP v. Tengku Adnan Tengku Mansor* [2020] 9 CLJ 30, the respondent and one Tan were charged with an offence under s. 16(a)(A) and s. 16(b)(A) of the MACC Act respectively. Tan was also offered the alternative charge under s. 109 of the Penal Code. He pleaded
D guilty and was sentenced. On the day of trial, the respondent applied to recuse the judge on the ground that he had recorded the facts involving the case against Tan. The High Court dismissed the recusal application for following reasons. The facts adduced for the sentencing hearing did not amount to evidence. Judges are trained to deal with joint trials when one
E co-accused pleads guilty. Judges are impartial and unbiased when a co-accused pleads guilty. The joint trial in question was not predicated on joint liability that requires common intention. The cases of *Yap See Teck v. PP* [1983] 1 CLJ 97; [1983] CLJ (Rep) 953 and *PP v. Mohd Amin Mohd Razali & Ors* [2002] 5 CLJ 281 were cited.

F **[16]** The High Court decision was reversed by the Court of Appeal on the following grounds. The two cases cited by the High Court were decided without the benefit of the "real danger of bias" test. It was not possible for the presiding judge who had seen the facts of the case and the documentary exhibits to "completely obliterate" it from his mind. The Court of Appeal
G also said that under the "real danger of bias" test a presiding judge should now refrain from presiding over a trial after he had accepted a plea of guilt from a co-accused.

[17] However, the Federal Court restored the decision of the High Court on various grounds and emphasised that the real danger of bias test does not
H automatically translate into an extremely low threshold although it is a lower threshold than that of an apprehension of bias or likelihood of bias test. In respect of the fear that the judge would have been aware of the facts of the case when recording the guilty of a co-accused, the Federal Court speaking through Nallini Pathmanathan FCJ observed as follows:

I (i) A judge is a professional who undertakes the job of determining the guilt or otherwise of an accused such as the respondent, on the basis of evidence which has been the subject of the due process of

law. That means he relies on evidence that has been subject to the laws of evidence and cross-examination. A judge, unlike jurors, is trained in the law so as to remain impartial despite reading facts relating to a case. This is particularly apparent in today's world where social media ensures that not only the facts of a case, but a myriad of opinions and comments, are virtually inescapable. It is therefore incorrect to assume that a mere recording or sighting of a factual matrix will create a bias against the respondent;

(ii) A judge takes the judicial oath of office, which requires adherence to the Federal Constitution. Article 5 FC which enshrines the right to life, encompasses the right to a fair trial. (see *Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd & Anor* [2004] 1 CLJ 701; [2004] 2 MLJ 257 and *Gan Boon Aun v. PP* [2016] 6 CLJ 647; [2016] CLJ JT (II)). The essence of a fair trial is an impartial judge as famously stated in *Surinder Singh Kanda v. Government of Malaya* [1962] AC 322 where Lord Denning described one of the twin pillars of the laws of natural justice as comprising, *inter alia,* an impartial tribunal or judge. The laws of natural justice comprising a part of the common law are an intrinsic part of the FC. This fundamental aspect of a judge's function and independence cannot be undermined by spurious and insubstantial attempts to allege bias.

(iii) The practice of a presiding judge continuing to hear a joint trial after one co-accused has pleaded guilty is settled law in this jurisdiction, based on a long line of authorities that implicitly recognised and affirmed that impartiality was maintained in such a joint trial. The reasoning in that line of case law, in both *Yap See Teck* and *Mohd Amin Mohd Razali* ought not to be lightly disturbed, again on relatively flimsy grounds. That is why a prescribed procedure has been advocated and followed for several decades.

[18] We shall now turn to the facts underpinning the complaint of the instant appellant that the Sessions Court Judge should recuse himself. The main reason is that the Sessions Court Judge had heard the forfeiture application under s. 41(1) of the MACC Act in respect of the cash monies in the possession of the appellant. And of the 146 money laundering charges that the prosecution preferred against the appellant under AMLATFPUAA, six charges are related to the very same cash monies. Section 41(1) of the MACC Act reads as follows:

(1) Where in respect of any property seized under this Act there is no prosecution or conviction for an offence under this Act, the Public Prosecutor may, before the expiration of eighteen months from the date of the seizure, apply to a Sessions Court Judge for an order of forfeiture of that property if he is satisfied that such property had been obtained as a result of or in connection with an offence under this Act.

[19] Affidavits and submissions were filed by the appellant and the prosecution in the forfeiture application. At the time that the counsel for the appellant applied to recuse the learned Sessions Court Judge from continuing with AMLATFPUAA case against the appellant, no decision had been made in respect of the forfeiture application under s. 41 of the MACC Act. Nonetheless, counsel for the appellant submitted that the learned Sessions Court Judge would have formed an opinion and would be prejudiced against the appellant. For this reason, counsel for the appellant had urged the Sessions Court to recuse himself from trying the AMLATFPUAA criminal charges. We find no merit in the application for the following reasons.

[20] It may well be that the cash monies which are the subject matter of six of the AMLATFPUAA charges are the same monies in the forfeiture application. However, the forfeiture application was not heard by way of trial. Therefore, although affidavits and submissions were filed in the forfeiture application, the learned Sessions Court Judge did not make any finding on the credibility of the appellant beyond having access to the competing affidavits of the appellant and the prosecution. Most importantly, the Sessions Court Judge did not decide the forfeiture application on its merits. He dismissed the application on the sole ground that cash monies would be tendered as exhibits in the pending money laundering criminal case under AMLATFPUAA. In the premises, the argument that the Sessions Court Judge had formed an "opinion" and was "prejudiced" against the appellant has no factual basis as the application was not decided on the merits. In any event, the decision was in favour of the appellant.

[21] We note by way of analogy that in a summary judgment or striking out applications in civil cases, a judge would have access to affidavit evidence on the merits of the case. Nonetheless, a judge is generally not precluded from proceeding with the trial if the application fails unless he has made adverse findings or remarks that can be construed as infecting his judgment in the pending trial with bias against a party. In the instant case, as we said earlier, no finding on the merits of the forfeiture application was made. In fact, the appellant received a favourable decision as the application was struck out. In the premises, we cannot see where is the "real danger of bias" if the same judge hears the AMLATFPUAA case. Finally, we would echo what was observed in the Federal Court in *PP v. Tengku Adnan Tengku Mansor* (*supra*). A judge is trained to administer justice impartially having regard to the evidence in each case. Unless, it has been demonstrated that he has a personal interest in the case or that he had previously made adverse findings in relation to a party on the same evidence as in the case at hand, he should not be recused merely because he had access to affidavit evidence in the course of hearing a related case. Otherwise, the threshold for recusal would be so low that it would unwittingly encourage and facilitate "judge shopping".

[22] We have also given consideration to the case of *PP v. Lau Tuck Weng & Anor (supra)* which was cited by counsel for appellant. However, the facts of that case in relation to this case are as dissimilar as chalk to cheese. In that case, the learned judge withdrew from trying a criminal case upon being informed by the prosecution that one Chan Ah Kow is a potential defence witness. There was a very good reason why the prosecution intimated this fact to the learned judge. Chan Ah Kow was charged with another person previously and the trial was conducted by the same judge. However, Chan Ah Kow was acquitted at the close of the prosecution's case. The defence of the other accused person was called. When Chan Ah Kow gave evidence to support the defence, the learned judge made adverse findings against him with regard to his complicity. It was for this reason that the learned judge decided to recuse himself. However, as we pointed out, given the reason of the Sessions Court Judge in the instant case for dismissing the forfeiture application, it goes without saying that there was not an iota of adverse finding against the appellant. For all the above reasons, we find that there is no appealable error in the decision of the learned High Court Judge to dismiss the revision application in respect of the recusal issue.

Joint Trial

[23] The Sessions Court granted the application of the prosecution for the 146 charges under AMLATFPUAA against the appellant to be jointly tried with the case against Awang Mohd Tahir Mohd Talib, Fauziah Ag Piut and Lim Lam Beng. The charges against the three accused persons are as follows:

(i) one charge under s. 4(1)(a) and 11 charges under s. 4(1)(b) of the AMLATFPUAA against Awang Mohd Tahir Mohd Talib;

(ii) 17 charges under s. 4(1)(b) of the AMLATFPUAA against Fauziah Ag Piut;

(iii) two joint charges under s. 4(1)(b) of the AMLATFPUAA against both Awang Mohd Tahir Mohd Talib and Fauziah Ag Piut; and

(iv) four charges under s. 4(1)(b) of the AMLATFPUAA against Lim Lam Beng.

The two main grounds raised by the appellant in the petition of appeal are as follows. Firstly, the accused persons face different charges that involve different offences. Nothing in the charge sheets connects the appellant with the other accused persons. Secondly, it was not considered whether the offences were committed in the same transaction. We find no merit in the complaint that the decision of the learned Sessions Court Judge to order a joint trial was not proper and that he wrongly exercised his discretion. Our reasons are as follows.

[24] The provision that deals with joint trial of accused persons is s. 170 of the Criminal Procedure Code. The circumstances in which different accused persons may be tried in a single trial is stated in sub-s. (1) which, shorn of illustrations, reads as follows:

> (1) When more persons than one are accused of the same offence or of different offences committed in the same transaction, or when one person is accused of committing an offence and another of abetment of or attempt to commit the same offence, they may be charged and tried together or separately as the Court thinks fit, and the provisions contained in the former part of this Chapter shall apply to all the charges.

[25] The above-mentioned provision has been invoked in a plethora of reported cases where the prosecution had charged two or more accused persons jointly or had charged them in separate cases but had applied for joint trial at a later date. There are two disjunctive limbs in s. 170(1) that stipulate the conditions when more than one accused person may be jointly tried. The first limb provides the condition that the offences in question must be committed in the same transaction. The second limb provides that the principal offence and the offence of abetment or attempt of the same offence may be tried together.

[26] In the instant case, the prosecution relied on the first limb. One of the arguments of the counsel for the appellant to oppose the joint trial was that, although all the charges are under AMLATFPUAA, the offences referred in the charges against the appellant and the others are not the same. This argument cannot be sustained as the first limb clearly says "same offence or different offence". The only condition under the first limb is whether the offences were committed in "same transaction". Thus, it is not correct to argue that the appellant cannot be tried together with the other three accused persons merely because the offences are different. As has been stated in many cases in the past, although the general principle is that every accused must be tried separately for every distinct offence, there are exceptions to this rule. We can do no better that reproduce the following passage from *Jayaraman & Ors v. PP* [1979] 1 LNS 36; [1979] 2 MLJ 88 that discussed the exceptions. Harun J in the above-mentioned case said as follows:

> The general rule is that every accused person should be charged and tried separately for every distinct offence: s. 163 CPC. This general rule, however, is subject to four exceptions, *viz.*:
>
> (i) Not more than **three offences of the same kind** committed within the space of 12 months may be tried together: s. 164 CPC.
>
> (ii) One trial for all offences committed by the same person arising out of the **same transaction**. There is no limit as to the number of charges that may be preferred against an accused person at such trial: s. 165 CPC.

(iii) Where on the same set of facts several offences are disclosed and it is doubtful which particular offence to charge; the accused may be charged with all the offences disclosed or in the alternative for every such offence. There is no limit to the number of charges: s. 166 CPC.

(iv) Where several accused persons commit the same offence or several offences of the same kind or different offences in the **same transaction**, then all the accused persons can be charged with committing all the offences at the same trial. Here again there is no limit to the number of charges: s. 170 CPC. (emphasis added)

[27] It must be noted that the fourth exception in the above excerpt pertains to s. 170(1). It permits more than one accused person to be tried together although the offences in question may not be the same. As we said earlier, the primary requirement is that the offences in question were committed in the same transaction. The test that has been adopted by our courts to determine what is "same transaction" is the test that was given in the well-known case of *Amrita Lal Hazra v. Emperor* 42 Cal 957. It was described as the "best test" by the former Court of Appeal in *Chin Choy v. PP* [1955] 1 LNS 17; [1955] 1 MLJ 236. The *Amrita* test is as follows:

It is not possible to frame a comprehensive formula of universal application to determine whether two or more acts constitute the same transaction; but circumstances which must bear on the determination of the question in an individual case may be easily indicated: they are proximity of time, unity or proximity of place, continuity of action and continuity of purpose or design.

[28] In respect of the *Amrita* test which has been consistently followed by Malaysian courts to determine the test of "same transaction", Lee Hun Hoe J in *PP v. Loh Ang Sing* [1964] 1 LNS 145; [1965] 2 MLJ 129 said that it is not necessary for all the limbs of the test to be satisfied. The crucial limb is unity of purpose or design. The relevant passage reads as follows:

The usual tests applied to decide whether different acts are parts of the same transaction are proximity of time, unity of place, unity of purpose or design and continuity of action. However, I do not think it is necessary that all of them should be present to make the several incident parts of the same transaction. In my view the main test is that of unity of purpose or design. Unity of purpose or design and continuity of action are essential elements to link together different acts into one and the same transaction. If the various acts are done with a particular end in view they may be treated as parts of the same transaction.

[29] We agree with the observation of Justice Lee Hun Hoe. We also think that in money laundering or corruption cases that involves several persons and an elaborate scheme, it is entirely probable that the place of crime or the time applicable to a particular accused may differ from that of a co-accused. However, the common link between accused persons would be "unity of

purpose or design" to commit the crime in question. In the instant case, all the money laundering charges in question are allegedly in relation to corrupt practices committed by accused persons who held senior positions in the Sabah Water Department. Awang Mohd Tahir bin Mohd Talib was the Director of the Department and the appellant was his Deputy. Lim Lam Beng is a Former Deputy Director. The other accused person is the wife of Awang Mohd Tahir Bin Mohd Talib. The learned DPP indicated and there is no reason to doubt his statement that the case of the appellant and that of the other three accused persons involve common witnesses. In *Jayaraman & Ors v. PP* (*supra*), the court citing the Indian authority of *Babulal Choukhani v. Emperor* AIR 1938 PC 130 said that the point of time to determine whether the condition for joinder is satisfied is at the time the charges are preferred. Therefore, the material that must be considered is the charges in questions. In the instant case, on the face of the charges and submission of the DPP, there is a link between all the offences allegedly committed by the said senior officers of the Sabah Water Department which suggests "unity of purpose" or "design". Learned counsel for the appellant argued that the prosecution cannot show that the "unlawful activity" ingredient in the charges between all the accused persons are connected. In our view, the evidence in respect of the elements of the offence, particularly "unlawful activity" is something that the prosecution must adduce at the trial and not at this stage.

[30] Once the test of "same transaction" is satisfied, it is a matter of discretion of the trial judge whether a joint trial should be ordered in the circumstances of the case. In *Jayaraman & Ors v. PP* (*supra*), the court said as follows:

> In *R v. Grondkowski and R v. Malinowski* [1946] 1 KB 369, the Court of Appeal held that the granting or refusing of the application for separate trials is a matter of discretion for the trial judge, and where such discretion had been judicially exercised the Court of Criminal Appeal will not interfere unless it appears that a miscarriage of justice has resulted either from the granting or the refusal of the application.

[31] In *Syed Ismail v. PP* [1967] 1 LNS 175; [1967] 2 MLJ 123, Raja Azlan Shah J (as HRH then was) similarly said that the discretion of the trial judge should not be reversed unless it was exercised "capriciously".

[32] In respect of the question of prejudice to the appellant, counsel for the appellant cited the case *Daniel Yong Chen-I v. PP* [2020] 3 CLJ 86; [2019] MLJU 661 in support. However, the circumstances in the said case are very different from the instant case. The applicant in that case was charged under s. 29A of the Securities Industry (Central Depositories) Act 1991 for allowing his wife to use his account to buy shares in a company. The wife of the applicant and another accused person were charged under the Capital Markets and Services Act 2007. The four charges against wife of the

applicant related to the purchase of the same shares. The charge against the other accused person was in respect of giving insider information to the wife of the applicant. The Sessions Court ordered the applicant and the said two accused persons to be tried together under s. 170(1) of the Criminal Procedure Code.

[33] The High Court held that a joint trial would prejudice the applicant for a number of reasons. The charge against the applicant was less complicated. There were complications affecting the rights of the applicant in relation to the evidence that would be elicited from cross-examination of his wife as she would become a co-accused in the same trial. The applicant's right to rely upon the privilege given to marital communications under s. 122 of the Evidence Act 1950 would be at risk. The learned High Court in that case said that even if charges show continuity of action or proximity of time, the overriding consideration is whether a joint trial would prejudice or cause injustice to the applicant. It is for this reason, the order for joint trial was set aside. However, in the instant case, it is our view that the appellant failed to demonstrate that prejudice or miscarriage of justice would result from a joint trial. In fact, as common witnesses would be called to testify against all accused persons including the appellant and the element of same transaction has been demonstrated, we find no reason to conclude that the learned Sessions Court Judge exercised his discretion wrongfully. It follows that the learned High Court Judge had no material to revise the said decision under s. 323 of the Criminal Procedure Code. In fact, as noted by the High Court, the trial would be expedited for the benefit of all because of the order for joint trial.

[34] For all the above reasons, we dismissed the appeal and affirmed the decision of the High Court.